MINUTES
REGULAR MEETING OF BOARD OF LAND COMMISSIONERS
March 21, 2005, at 9:00 a.m.
Scott Hart Building Auditorium
301 N. Roberts, Helena MT

PRESENT: Governor Brian Schweitzer, Superintendent of Public Instruction Linda McCulloch, Attorney General Mike McGrath, Secretary of State Brad Johnson, and State Auditor John Morrison

Mr. McGrath moved for approval of the minutes from the February 22, 2005, meeting of the Board of Land Commissioners. Seconded by Mr. Morrison. Motion carried unanimously.

BUSINESS CONSIDERED:

305-1 APPROVAL OF THE OIL AND GAS LEASE SALE

Mary Sexton, Director DNRC, said the department's quarterly oil and gas lease sale was held March 1, 2005, with a total of 123 tracts covering 52,000 acres being offered for sale. All tracts received bids and they totaled $2,186,442.52. The average bid per acre was $41.88. For the State of Montana sale this is the highest average per acre and eighth highest total bid amount on record. The highest bid was $262 per acre for Tract #10, 640 acres in Blaine County. The department has the ability to reject any and all bids and Tract #72 covering 640 acres in Richland County generated a bid of only $2.00/acre. There was a total bid offer of $1,280. Commercial production has previously occurred from the only well drilled in this section. Commercial production currently exists in the adjacent tracts including from the formation below the depth drilled on Tract #72. The March sale also included a state section four miles northwest of Tract #72 and it generated a bid of $42 per acre. The department believes that the March sale bid on Tract #72 does not reflect the leasing and production activity on and adjacent to the section. The high bidder has been advised of this determination. The department's intent is to reoffer the tract at the June 7, 2005, lease sale. The department believes this is in the best interest of the trust beneficiaries. The Board has the opportunity to segregate Tract #72 in considering approval of the lease sales.

Monte Mason, DNRC Minerals Management Bureau Chief, said Director Sexton gave a good introduction. As she pointed out, we had a very nice sale in March. We are seeing some increased interest by developers in Montana. Other than on Tract #72 we are very happy with the results and would hope the Board approves them. On Tract #72, the bid generated $2.00 per acre. We had two applicants request to have that tract put up for bid. Sometimes we do get more than one company requesting to put a tract on the sale ahead of time. We take the first one and tell the second company it has been nominated. But there were two companies interested in the tract. Retamco was the bidder at $2.00, and there was a third company that wanted to bid on it. So, that's three entities. It does have production to the north in the Radcliffe-Madison, it does have production adjacent to it to the west from the Red River. The well that was drilled on the section produced for some time out of the Radcliffe, I don't have all the information on it but it looks like it watered out. They started producing more water with the oil and at some point the oil cut so low that at 9,000 feet you can't afford to produce it. There is a horizontal well drilled on the tract to the north in the Radcliffe and that is a way to get more production out of a single well bore because you expose more formation to the well bore. So, there is some activity in that area adjacent to that section. There is a tract four miles to the northwest of this tract which is section 36 which went for $42.00 per acre, also to Retamco. Based on the nomination interest and the technical data related to that section I came to the conclusion that I recommend to the Board we not issue this one and

that we put it on the June sale. There is a good possibility it should pull in a significantly higher sum. Having said that, the flip side is that it is an auction sale. Legally we do reserve the right to reject any and all bids for anything we do. That's in the rules, the process, and the tract list we mail out to interested parties. Only the Land Board can issue leases after we hold a sale. I don't take this action lightly, I can't remember if I have ever pulled one in the past 10 years. In this case, it does merit giving it another chance. However, we do have an auction process and the integrity of that process is something I take seriously. We had this auction and that was the high bid. But I think in this case reoffering it would be the smart thing to do in the interest of the trust beneficiaries.

Joe Glennon, Retamco, said our company purchased Tract #72. I sent in a letter that touches on the points of our position. Our company is owned by a party that has been in the industry for over 50 years. Of the 123 tracts, our company purchased 41. There were three tracts offered in Richland County and we purchased all of them. The one directly to the north was for $43.00 per acre, approximately six miles to the northwest we purchased one for $13.00 per acre. I believe the $2.00 per acre Richland County tract is about the fifth or sixth we purchased. As pointed out in my letter, our method of playing a state is to have a large footprint on a lot of acreage and there is cost averaging going into it. By buying that tract for $2.00 per acre and your not issuing it to us has had an impact on what we spent on the balance of the tracts enabling us to go to $43.00 per acre on a tract. With that in mind, we would request the Board honor the lease and reissue it to Retamco as the high bidder.

Governor Schweitzer said do you have other acreages in Richland County beside what you have with the state?

Mr. Glennon replied we just started acquiring them and we've put them together in Township 25 Range 56 which is about three townships to the west. But the major play in the Bakken Fairway is what is generating the high prices and the majority of the drilling activity going on in Richland County. In T25 and T26 R56 which is close to production, you're too far north and out of the Fairway and we're finding most of that acreage open and are just starting to put our blocks together in Richland County.

Governor Schweitzer said this bid process has a minimum bid. What is that?

Mr. Glennon said it is $1.50. It was opened by another party, we upped them to $2.00.

Ms. McCulloch said did you expect when you went into the bid process to be able to get this tract for $2.00 per acre?

Mr. Glennon said we didn't expect to pay $43 for the one north of that. I expected most of that acreage to be at $20 range which we purchased one for $2.00, one for $13.00, and one for $43.00.

Governor Schweitzer said I have participated in a lot of auctions over the years and so I appreciate the importance of maintaining that integrity. But I think I heard from the department's staff that this is the first time in how many years?

Mr. Mason said over ten.

Governor Schweitzer said how many auctions have we had where we've ever brought it to the Board and said we ought to open it again?

Mr. Mason said they are done quarterly, so lease sales would probably be 50 lease sales, number of tracts would be over a thousand easily.

Mr. Glennon said but Monte that is in your ten years of employment, can you put a finger on when it has ever taken place?

Mr. Mason said I am advised by legal counsel, Tom Butler, that there has been one in fifteen years prior to this one today.

Mr. McGrath said there has been some question about whether we have a contract here, the legal process, and Mr. Mason is correct there is no contract. The Board is the contracting party. It is the way the public bid process works not only at the state level, but with local governments as well. There is no contract here. There is an offer. If we accept the bids there is an acceptance, and then we have a contract. But under contract law there is not a contract until the Board of Land Commissioners approves it. Obviously as trustees we have an obligation to get the highest rate of return if there is a lease that went on an adjacent area or near there for $43.00 then it doesn't seem to me appropriate that we would accept the bid of $2.00. That would not be following our trustee obligation to accept such a bid.

Mr. Glennon said if in my letter it brought up the question of legality, that wasn't the point I was trying to make. It was the integrity and the fact of your number of tracts, we purchased 40 of them, in dollar figures $250,000 of that was our participation.

Governor Schweitzer said this appears to be an anomaly, $2 versus $42. If in fact that anomaly is based on the actual value of that land at an auction, the people of Montana probably deserve to have another competitive opportunity to make sure that that is the actual value of that property. It works out to about $20,000 less for that lease than if it would have brought $42. I have no idea if it would bring $42 in an another auction, or if it would bring $13, or perhaps $1.50.

Mr. Glennon said could we negotiate if the Board does not approve at the bid price?

Governor Schweitzer said negotiate on?

Mr. Glennon said the price. Because in effect, paying the going rate is what we were anticipating going into the sale. By honorably stepping up and bidding for it and all the rest of the tracts, we stepped up to the plate.

Mr. McGrath said I don't think we can do that legally, the only way we can address this is to open it up at the June sale. We will have to rebid it.

Governor Schweitzer said I have a question. Chronologically was Tract #72 the first tract you bid on? The middle one? Or the last one?

Mr. Glennon said the first. It was the first tract offered in Richland County. We paid $2.00 per acre for that and one about six miles to the northwest we paid $13.00 per acre. The third tract we paid $43.00.

Motion was made by Mr. McGrath to approve the oil and gas lease sale as proposed by the department which would include denying the sale of Tract #72. Seconded by Ms. McCulloch. Motion carried unanimously.

305-2 REQUEST FOR APPROVAL OF COMMUNITIZATION AGREEMENT

Ms. Sexton said a communitization agreement brings together small tracts sufficient for the granting of a well permit under applicable spacing rules. They are not formed until a well has been drilled and proven to be productive. We have one for Burlington Resources, three for Klabzuba, and one for Headington Oil.

Monte Mason said on these CA's it is a creation of the fact that there is divergent mineral ownership on areas that you only need one well to drain. In order to prevent or make unnecessary the drilling of multiple wells because there are multiple landowners one of the duties of the Board of Oil and Gas is to prevent that. They do that by establishing spacing areas and will say this well can reasonably drain this area. If there are multiple mineral owners in that then there is a communitization agreement that provides for the allocation of the revenue from that well to the respective mineral owners. For single well ones like this, it is fairly simple. There will be a spacing unit a half section, a section, whatever is appropriate for that particular area and that particular formation that is established by the Board of Oil and Gas and the various mineral owners will traditionally share on a basis of acreage prorated. That is what we have here. The only additional thing of interest is the first one is a standard Eagle well, a vertical well bore where we are sharing production, it is the same for the second and third one. The fourth one is for Headington Oil with a dual lateral horizontal well into the Bakken formation which is down about 10,000 to 11,000 feet to the formation. In this particular case you are communitizing two whole sections, 1280 acres, the well is actually the rectangular dot in the center of the request. The lines are two laterals drilled out from the vertical within the formation at 11,000 feet that go out nearly a mile within the zone. What they will normally do is come back later and put another location in the north half of that spacing unit and have another dual lateral there, it kinds looks like a bow tie when completed. So the last two requests are of that particular situation. What that does is make the Bakken play profitable because it is a tight reservoir. It also means that there is less surface disturbance because you only have one surface disturbance for completing part of two sections.

Motion was made by Mr. McGrath to approve the requests for communitization agreements. Seconded by Mr. Morrison. Motion carried unanimously.

~~305-3 CX FIELD – COAL CREEK CBM WELL DRILLING APPLICATIONS~~
WITHDRAWN

This item was withdrawn by the DNRC Director Mary Sexton at her discretion. She said when we met with the staffers we didn't have time to discuss the interconnectedness and the broader repercussions of this particular application. It has to do with the BLM and the Board of Oil and Gas. Because of this and since this was the first one we were to bring before the Board, recognizing that we have three new Board staffers and two new Board members in visiting with the staffers I tried to gain input as to whether we were prepared from the staffer's standpoint and the Board to consider this, and it was recommended we have some informational sessions. Much as we did with the programmatic EIS we are considering today. When there are issues of substantial interest I think it is best that we all be as informed as we possibly can be. So we've suggested this be postponed until the next meeting. We will have a power point

presentation about this, we will have further meetings with your staffers so we can get as much information out to them regarding this issue.

305-4 WHISKEY MOTH TIMBER SALE

Ms. Sexton said this particular proposed sale is located near Plains, Montana, and is a limited access sale. It is an isolated parcel and because of that the landowner whose land we would have to cross wanted only one logger to be involved. It is located 20 miles northeast of Plains. It is a harvest of green sawlogs, and there has been tussock moth infestation in this area, so it is a disease-related timber sale. The estimated volume is 3,727 tons or 525, 000 board feet and the estimated sale value is $88,000. Ms. Sexton requested approval.

David Groeschl, Chief Forest Management Bureau, said as the Director has indicated the sale is pretty straightforward. It is a limited access sale. The logger that is working on the private land adjacent to this is the only individual that the landowner will allow through their property to access ours. It is Tri Con Lumber. They have given us a total bid of $33.00 per ton. Of that total bid, $23.64 per ton is the stumpage rate, and $9.36 per ton is the Forest Improvement Fee. That stumpage rate of $23.64 per ton is in line with what we see for negotiated rates for limited access sales. In the east side of the state $10 - $30 per ton is the range for negotiated rates. It is a seed tree harvest, the residual timber we're looking to maintain on the landscape is ponderosa pine and some of the healthier Douglas fir. Right now the stand is dominated by Douglas fir which is under attack by both Douglas fir tussock moth and mistletoe. The proposed sale is to help do some salvage to improve the health of the stand and to move it towards the desired condition of more ponderosa pine. There are no significant environmental impacts associated with this timber sale.

Mr. Morrison asked if there was any old growth involved in the sale.

Mr. Groeschl replied there is no old growth.

Motion was made by Ms. McCulloch to approve the Whiskey Moth Timber Sale. Seconded by Mr. Johnson. Motion carried unanimously.

305-5 DISCLAIMER OF INTEREST – SCHOOL ADDITIONS TO TOWN OF ALDRIDGE

Ms. Sexton said this is a disclaimer of interest in the Town of Aldridge located in Park County. There is a cloud on the title and this is a historical issue.

Tommy Butler, DNRC legal counsel, said this particular tract was purchased many years ago under a program analogous to a contract for deed, called a Certificate of Purchase. In this case the purchaser completed all of their payments, and we have records they have completed the payments, over a course of decades. So the tract has been fully paid for. Unfortunately, the successor in interest to the original purchaser could not find the original deed that had been issued by the state. The state usually keeps good records, but we've been unable to find the state patent to the original purchaser. But we certainly agree that this land has been fully paid for. So in order to clear the title on this land, the successor needs a disclaimer of interest from the state so he can get clear title and institute a quiet title action to clear up the title.

Motion was made by Mr. Morrison to grant the disclaimer of interest. Seconded by Ms. McCulloch. Motion carried unanimously.

305-6 AWARD OF STATE GRAZING LEASE # 9904
(Harlow and Broadbent case)

Governor Schweitzer recused himself at the introduction of this agenda item. He passed the "gavel" to the Attorney General and left the room saying he personally knows all the parties involved in this case.

Ms. Sexton said this is a dual action by both former Director Clinch and myself, one of those things I inherited. There was a hearing held on this case in response to Judge Sherlock's decision regarding preference. The hearing was held in December 2004 to provide a recommendation to the Land Board as to the selected lessee for this lease based on the results of the hearing, looking at stewardship issues and a variety of other issues. Again, former Director Clinch did issue a report and recommendation at the end of December. I reviewed that report and recommendation. I also reviewed all of the information that was available in the department regarding this case, legal briefs, letters, reports, I also heard the full two hours of the hearing. So I did review, myself personally, the pertinent materials related to this case, and given my review of the case then I did concur with the recommendation that the lease be given to Harlow's with the additional stipulation that there be a requirement to develop and implement a management plan for the lease. In my opinion there were issues with the property in that it could be improved as to its condition. There was a report by John Lacey from MSU and I read the department reports as well regarding the condition of the property. There are prairie dog downs there, the property has been grazed at somewhat the same time each year, and so my recommendation was, and this is fully within the statutory abilities of the department, to require the lessee to implement a management plan that is written up by the department. That is my addition to the report and recommendation that was written by Director Clinch. Both my additional recommendation as well as Director Clinch's recommendation are included in the Board's packet. Again, it is my recommendation to the Board to include Director Clinch's recommendation that the Harlow's receive the lease and to add to that that a grazing plan on this property be implemented.

Mr. Johnson asked if the Harlow's are amenable to the implementation of the management plan?

Ms. Sexton said it is my understanding that they are. Again, this is something that even if this were not an issue such as this, we have that authority when we see the conditions indicate that the condition of the land can be improved, we can issue a management plan at the discretion of the department.

Mr. McGrath called for proponents of the departments recommendation to testify.

Fred Finke, Montana Stockgrowers Assn., said his only testimony is to speak in favor of the department's concurrence. We support the preference right, and the Board has an obligation to get the best return on the public's investment, but I am speaking in favor of the preference right. It adds stability to a lot of our farms and ranches, stability of their operations, and stability of our communities throughout the state. I concur with the department's recommendation.

Gale Harlow, lessee, said I bought this ranch in 1990 and we've had drought ever since. It has been hard to improve it much in the drought years. Most of the state lease is now a prairie dog town and there isn't too much grass that grows on a prairie dog town. Its been tough to get improvements, but I've been talking with the Land Board and they've approved now to take care of these prairie dogs whereas before

we didn't know what status they were in, whether we could kill them off or couldn't. I think we can get rid of quite a few of them which would really help with the problem. Most of the problem really is the prairie dogs. There are a lot of them and they are eating everything out there. If we can take care of them it would solve a lot of the grazing problems. I have leased state land for roughly 38 years on four or five difference leases and I've never been written up for anything on them like grazing, water, or weeds. We have some leafy spurge about 15 years ago that came in and we've been working on it and have almost eliminated the weed problem of leafy spurge. We make our living with the grass that does grow on the rest of it, and we will sure work with the state board to take care of things. On three of my other state leases, I've plowed up all the leases and reseeded them back to tame grasses which had a lot of blue gamma and club moss on them when I plowed them up. That seemed to be the fastest way to get the club moss and sage brush out. There are other ways to kill weeds too. The club moss is the worst because it is a little root system and it adsorbs water like a sponge. We will work out a program with the state to handle that. Broadbent came onto this piece of state land a few years ago and did some water projects for irrigation for his property. I see his attorney is here today and he handed me an affidavit from Mike Udary who tells about using the dirt. Mike Udary did some work for me on a steep hillside and he took the dirt from my ditch when he cleaned it and left it on the bank because the hillside is so steep but this particular piece of ground is flat. The creek is 50 yards away from the ditch and he left a big trench. The affidavit said it was appropriate for the materials to be removed from the irrigation ditch, which they did, they cleaned the willows out of it, and placed on the lower side of the ditch. Well, its not on a hillside where it meets anything, it is just flat ground. So they merely took it out and went over ten feet and laid it on flat ground. The letter is misleading in that his irrigation ditch needs support. They didn't level it, it is just piles of dirt stacked over on the side.

Jay Bodner, Montana Stockgrowers Assn./State Grazing Districts/Montana Public Lands Council, said all three of our organizations were very involved in this issue from the beginning. We filed as interveners on the case on behalf of the Board and the department, and Mr. Harlow. We thought the preference right was a very important issue for our members to reinstate some type of process that would allow a preference right to be reinstated. Following the court case and the preference right being ruled unconstitutional, we held a number of listening sessions across the state in conjunction with the hearings conducted by the department to just encourage our members to get out and learn what the new rules were, how they would affect them, how they would deal with the renewal process and preference right in the future. We had a very good turnout. A lot of people were not familiar with what was going to happen next, there was a lot of fear out there. When we went and informed them of how the rules would affect them I think people became quite a bit more comfortable that there would be a consistent renewal process put back in place. As the rules were adopted by the Board last fall, we got a copy of the recommendation that was forwarded by the department. We feel comfortable that the department looked at all the rules, that they applied the rules consistently with how they were developed, and we support the department's decision to allow the lease to go to Mr. Harlow.

Mr. McGrath called for any opponents to testify at this time.

Harley Harris, attorney for Mr. Broadbent, said two years ago I stood before this Board and told it that the action being proposed at that time by the department was legally flawed. The rest is history. The Board's decision to follow at that time the department's advice has cost lots of money, has required it to invest a lot of time and effort into this situation. Unfortunately, here we are again. This proposed decision by Director Sexton based upon the proceeding conducted by her predecessor, Director Clinch, is both legally flawed and factually unsupportable. Let me just touch on the legal flaws of this process first. Immediately at the beginning of the hearing Mr. Butler, acting as the advisor to Hearing Examiner Clinch, informed everyone in the room that the issue of price, the amount that had been bid by Mr. Broadbent

($23/AUM versus the $10 that had been set for this) was not an issue. It was not to be talked about, it was not relevant and had already been decided. In point of fact, it was not addressed. This position flies clearly in the face of Judge Sherlock's ruling. How can you determine who is the best lessee without considering the price they are offering to pay? This is bad business, bad management, and it is illegal. Before the Board decides to take a vote on this and if it so chooses to accept the department's proposal, it ought to ask Mr. Butler for an explanation of that position.

Next, we were informed that the proceeding held in December 2004 was characterized as a non-MAPA proceeding. As a result of that, there was no discovery, no disclosure duties, no ability for cross examination, no ability to examine the department personnel, and no requirement for an independent unbiased hearing examiner. All of those had an impact on the hearing and played out in the ability that I had to represent my client in a fact-finding process. Before the Board takes a vote, before it decides it is an appropriate authority, ask Mr. Butler to explain what a non-MAPA proceeding is. I don't think there is such a proceeding.

As a result of this, the process from the beginning was legally flawed. At the hearing the surprise evidence presented was about this construction done in the irrigation ditch on the state section that Mr. Harlow just spoke about, it was something that arose right at the hearing. In point of fact, I have submitted today and provided members of the Board an affidavit from the man who did the work. Mr. Udary indicated that the work he did for Mr. Broadbent is the same type of work he did for Mr. Harlow without complaint. The point is that the process we were using in December 2004 was not designed to be the sole fair open finding of fact. No cross examination. I was informed that I couldn't cross examine the Harlow's or anybody else. The only way I could pose questions was through Director Clinch. If you listen to the transcript, in many cases Director Clinch would pass through my questions directly and without too much alteration. But in many cases he would rephrase them or in ways that either suggested an answer or significantly affected the impact. How effective would your cross examination be if you were required to run it through the judge? It was not a process designed to allow the facts to get on the table. I wasn't able to examine the department personnel, despite the fact that two of the three pieces of evidence used to indict Mr. Broadbent was evidence that came from department files and department personnel. This is inconsistent with the department's practice in other contexts. I do a lot of water right proceedings and it is very well established that you go into a hearing, the department lets you know who their expert witnesses are, and they are subject to examination. Here I had nothing.

Finally, there is no way that Director Clinch should have been presiding over this hearing. His presence and decision to preside over this hearing followed an appearance of fairness and was in fact unfair and biased. He was the one that made the first decision against Mr. Broadbent that led to litigation. The rules this Board has approved that followed in the wake of Judge Sherlock's ruling provide that there is a two step process. If someone wants to exercise a preference right there are a few hurdles they have got to clear. That rule specifically provides that if there is an ensuing hearing of this sort you get a new hearing examiner. I don't know why the Director thought it was so important that he needed to preside over it, I raised an objection to it. I thought the hearing was rushed. There was no need for it to have been held in late December. We're here in March and nothing seems to have critically happened in the interim. At the hearing, Director Clinch referred to Mr. Broadbent as an absentee landowner. I'd submit a fair review of this record, and suggest the appearance of fairness was not met. That hearing was a very disappointing proceeding. In my twenty years of practice, I've never sat through something like this, it smacked more of a bureaucratic lynching than it did a full and fair opportunity. I understand that Director Sexton has reviewed the record and I appreciate that. But I think that review is severely hampered by a number of things, i.e., not being there. The atmosphere very much plays into how you understand what happens during a fact-finding process. Regarding the taped transcription, there were a number of times I asked for

it to be stopped. We were in the thick of examination and I don't know if it is a complete and accurate transcription. As far as process, I don't think this bears credibility that this Board should be requiring of the department.

Factual issues, first the reclamation work near the headgate. I have offered you Mr. Udary's affidavit. He rebuts what Mr. Harlow said. It really has not been a resolved issue. Second, the issue of overgrazing on Broadbent's section, the section to the east on T19 R11E, has a couple of facts that the Board probably needs to understand better. The field assessment, the issue with respect to the Harlow parcel, recommended a cut of AUMs from 151 down to 127. On the tract that Mr. Broadbent has been indicted for being overgrazed, the recommendation was from 102 down to 100 AUMs. I think it flies in the face of reason in light of that fact for the department to decide clearly Mr. Harlow is a better lessee and better steward. There is another side to this that is dissatisfying and makes this evidence unfair to rely on. After receiving the assessment and report, Mr. Broadbent wrote Mr. Barney Smith from the DNRC Lewistown office a letter explaining a sub-lease issue which Mr. Broadbent took care of quickly, and also asked Mr. Smith if he would please come out to the tract and meet with his ranch manager and explain what the problem was, he wanted to get to the bottom of it. Mr. Smith would not do that. However, when I informed the department that I was having Mr. John Lacey come out to Mr. Broadbent's tract and review it, the department quickly sent someone out to check. I don't submit that that is a telling piece of evidence. But both of these pieces of evidence I just spoke about are unfair to rely on. One violation of a sub-lease rule has never been viewed as a particularly significant event or infraction. If that is the piece of evidence we hang our hat on today, it says the better lessee is the one who does the better paperwork.

The biggest set of facts here today is the report Mr. Lacey did. He documents in a thorough professional manner an overgrazed poorly managed tract. Director Sexton's recommendation has as much acknowledged that fact. The decision by Director Clinch does not in any significant way discuss that or come to grips with Mr. Lacey's analysis other than just characterizing it at the beginning of the discussion, it doesn't mention it. I would ask you to take a look at Mr. Lacey's report and see the contrast between the Harlow state section and the Broadbent's adjoining land, it is very stark. Mr. Lacey has done his homework, nobody has rebutted it. This tract is in need of better and more intensive management. At the end of the day, the Board's legal duty is to enter a reasonable decision based upon the record. You also have the responsibility here to set the standard for how the department is going to address these processes. In that respect, this decision sends an important message. The process does not carry with it credibility and fairness that this Board should insist on. This process and decision fails to conform to the law and that reflects on the credibility of DNRC. Mr. Broadbent in the end would ask the Board to do one or two things, first and foremost is send DNRC back to the drawing board and require a hearing process be done under MAPA and in front of an independent hearing examiner. Alternatively, I would submit if you're not comfortable contravening a Director's recommendation that the Harlow's are better stewards I would recommend to the Board that it send strong instruction to the department that the management plan it says it will implement should be strong and should fully implement the recommendations provided by John Lacey or explain why it is not. We would prefer another hearing be held under fair processes because we believe the facts will win over eventually. But if not, at least lets take care of this piece of land.

Mr. Morrison said I'd like to hear the department's response to the MAPA issue.

Mr. Butler said the first question you have to ask yourself is what process is due here? Essentially these are quasi-legislative informal hearings these are not adversarial hearings to determine property rights.

Mr. Morrison said doesn't MAPA specifically say that if there is an appeal and a remand that there a right to a different hearing examiner?

Mr. Butler said I am not familiar with that and this is not a MAPA hearing. I will explain why. This is not an adversarial hearing concerning property rights and just like the Attorney General explained with respect to the oil and gas leases, no one has the right to a lease contract with the state absent the Board's approval. When you are an applicant, you are an applicant. Therefore, the threshold question is what process is due an applicant? The answer is there is a reduced level of rights for an applicant as opposed to when we do a cancellation. When we do a cancellation you have to be accorded the full due process rights whenever you are depriving someone of recognized property right. We're not there. With respect to the issue of an objective or pure hearing examiner, that issue was resolved in the US Supreme Court case of Withrow v. Larkin wherein the court said the same director of an agency can resolve administrative hearing questions on issues that he previously had directed. If you're sending out an order as a director you can also act as the hearing examiner when reviewing that same factual question.

Mr. Morrison said I might not have clearly understood Mr. Harris' point but I thought what he was saying was there was a procedural problem associated with Bud presiding at the hearing after this matter had been remanded following an appeal. What I am interested in is whether we are in any jeopardy of having the district court throw this out again because of an administrative non-compliance.

Mr. Butler said my response is I am unaware of any case law or statute which would require that. This is not a MAPA hearing, it is a quasi-legislative hearing by the Board to choose who is the best lessee and to set conditions for that contract to be entered into between the Board and the lessee.

Mr. Morrison said it is your legal opinion on behalf of the department that if this matter ends up in district court again, challenged by Mr. Broadbent again, that the department is on solid ground and the Land Board is on solid ground if they uphold the recommendation of the department and award the Harlow's the lease?

Mr. Butler said yes it is. That is my recommendation. I can go through each one of these points with respect to Mr. Harris' complaints about the procedure. But obviously one of the issues here is whether the Board may take into account the impact of price upon the physical characteristics of the land. Mr. Broadbent had bid $23 per AUM, the director had previously set that rate for $10.52 per AUM month. This is the prevailing community standard issue. Unlike an oil and gas lease where price does not necessarily have an impact on the operator's good stewardship practices, the price charged by this Board has a direct impact on the profitability of that lease. We don't want to get that lease rental rate for just one year where somebody slicks off the grass and then leaves us with a weed patch, we want that sustainable revenue and to act as prudent trustees. We want to keep that tract in productive condition. Therefore it is incumbent upon the Board to set that rate at an economically and ecologically viable rental rate. It has been the position of this department that the prevailing community standard is an important concept in maintaining the productivity of grazing and ag lands. Therefore, it is our position that the $10.52 per AUM rate that was set here complies with the Board's duty to maintain the productivity of those lands and it is important that we maintain that posture. I disagree that Judge Sherlock's decision precluded this Board from taking into account the prevailing community standard issue. If you read his decision, he expressly left that issue alone and said the only thing he was concerned with was the automatic preference right in §77-6-205, MCA, and said that was improper of the legislature to automatically renew it to the lessee because it infringed improperly upon this Board's constitutional discretion to choose the best lessee. I think that is clear.

A MAPA proceeding is not required here because we are not dealing with a denial of a property right. And therefore, you don't get all the other procedural rights such as cross examination and discovery. These are informal hearings, people are under oath and sworn to tell the truth. But essentially the director is there to ask the questions and to draw the information he needs to make this quasi-legislative decision. I would disagree. It is not legally flawed. We have provided all the materials to Mr. Broadbent and we allowed Mr. Broadbent to testify via telephone at his convenience. The factual issue here in choosing the best lessee was largely based upon the fact that we have a good history with Mr. Harlow. This is a tough tract to operate because of the prairie dog concerns and it has been pretty dry out there. Mr. Harlow has done a good job of maintaining those conditions out there.

By contrast even though Mr. Broadbent professes he wants to do light touch grazing, Mr. Harris admitted that that was a term he had coined and that Mr. Broadbent really had no experience in any grazing matters. In fact he is an absentee lessee in that he depends upon local folks out here to carry out his ranch operations. Our impression was he doesn't do that very well because he absolutely hammered another state tract and this Board need only look at the photographs taken by Barney Smith to show you exactly what type of work Mr. Broadbent would do on this tract. And its not a pretty picture. Likewise, Mr. Broadbent was issued authority to clean out a ditch running across this very same tract and it was the impression of our range technician that there was an exorbitant amount of weeds left along that ditch. I suggest to the Board that it is well within the fact finding authority of this Board that those were the conditions that were out there and you can reasonably rely upon the testimony of Barney Smith and his report to the department. So, are there other legal flaws? No. Is there a firm factual basis for the Board's decision? Yes.

Tom Schultz, Administrator Trust Land Management Division, said the first question was one on process. It raised concerns about how the process occurred. Was it fair? Was it under MAPA? I just called someone from our office to bring over a copy of the rules the Board adopted regarding this. I am certain in the rules we adopted for the process we are going through that it specifically says it will not be a MAPA contested case hearing. The process has been fairly informal over the years. The process for the most part in a non-litigation situation works very well. Most of the folks coming to these hearings are not accompanied by attorneys, they are folks on the landscape and it works very well to sit down and have an informal discussion and understand the issues from both perspectives and move in that fashion. So we have specifically not done a MAPA contested case hearing per the rules because it affords us an opportunity to get to know the folks on the ground and makes the process work. In this particular setting where you have litigation involved, it may not work as well for attorneys and clients on the phone but the process does for the most part work very well. I am reluctant to say how Mr. Broadbent will manage the tract in the future were he granted the lease. But I can say that given the specific facts in this case and reviewing the file and listening to what people have to say, Mr. Harlow has done an adequate job of managing the ground given the conditions. We did talk about the prairie dog situation, we asked Mr. Lacey about it. Regarding the prairie dogs, nobody has denied they have had an impact on the productivity of that piece of ground. There has been some discussion whether it has contributed 20%, 50%, or 85% and I think our range specialist suggested it contributed more to the existing condition of that lease than Mr. Lacey did, but everybody acknowledged that the current prairie dog population has had an impact on the forage out there and the range condition. There has been no debate about that, its been more where on the spectrum has it caused that. In terms of should Mr. Harlow be granted a preference right, we think within the scheme that has been outlined per the rules the Board adopted, it fits, he should be granted the preference right.

Then the question is who is the best lessee? That is the second item we had to evaluate. In doing that analysis we looked at a couple of things. What kind of stewardship has Mr. Harlow provided? We think

it has been adequate stewardship for the ground for the condition it is in. Then we looked at Mr. Broadbent's case. The questions were raised should Mr. Clinch be there, why did we have an inspection occur right beforehand and I can see it appears there was a conspiracy to get somebody, but that wasn't the case at all. The range inspection that occurred on Mr. Broadbent's lease is one that came up – we do the inspections the year before they are up for renewal. Mr. Smith did go out and review Mr. Broadbent's tract and documented some overgrazing. There really hasn't been any dispute of the overgrazing that has been documented, it's been a question of why did it occur, what was the condition of the tract beforehand. We had that subleasing issue, and we have not made a big issue of subleasing. For the most part, because of this issue we will probably not do that in the future. In this case if we'd made a big issue out of subleasing we would have intentionally looked at terminating Mr. Broadbent's lease and that's never been recommended. If there is an illegal subleasing issue we notify folks and get it corrected. Again, the factual basis showed us a couple of things in the short term, the current range inspection and the subleasing issue. The ditch issue was raised as an issue of potential stewardship. I didn't personally put a whole lot of weight into the ditch issue. Any time someone cleans out a ditch there are residual weeds that can occur and that wasn't a heavy factor. The factor for me personally was looking at Mr. Harlow's stewardship, recognizing the effect the prairie dogs have had, realizing that Mr. Broadbent's lease had recently been reviewed and evaluated, and due to the circumstances that arose, and we thought this was a prudent decision to go ahead.

Mr. Johnson asked Mr. Harlow to characterize the impact not having this lease renewed would have on his operation.

Mr. Harlow said yes it would have an impact on us. Percentage-wise I suppose it would be 10%.

Mr. Johnson said potentially you'd be talking about reducing the cow herd by 10%?

Mr. Harlow replied yes.

Mr. Morrison said how long do you think it will take to eradicate the prairie dog town and does that land become more productive once you do that?

Mr. Harlow replied we've done it on some other property as well and within a year you can't even believe the difference. How long will it take to eradicate them? Two days. I've been working with the county agent who has a new pill out that has a poisonous gas in it and you put that pill down in the hole and pour water into it and cover the top of the hole and that gets rid of them very fast.

Mr. McGrath said Director Sexton you indicated that you reviewed this entire hearing process. Do you feel that the transcript of the hearing was adequate for you to understand what happened?

Ms. Sexton said yes it was. At times I had to stop and hear it again because sometimes due to background noise it was hard to hear a response. But I believe, and having heard taped hearings before, that it was a reasonable facsimile of what occurred there, the evidence that was given and the responses.

Motion was made by Mr. Morrison to approve the award of state grazing lease #9904 to Mr. Harlow as recommended by the department. Seconded by Mr. Johnson. Motion carried unanimously.

305-7 PROGRAMMATIC PLAN FOR REAL ESTATE MANAGEMENT BUREAU

Ms. Sexton said this is the information the Board received through a power point show at its Board meeting in February 2005. We went through this in great detail. This is the plan that has been in development for over four years. We did go through the EIS process, this is the Record of Decision which Jeanne Holmgren and I spent quite a bit of time going through to write the decision package. Looking at goals and objectives and evaluations being very key here, we did outline three direct goals of this programmatic EIS. The draft recommendation Alternative D will become our Real Estate Management Plan and it has three primary goals. First, as we are involved in real estate transactions in the department we share an expected community growth in those areas where we have trust lands which is pretty much all over Montana, and we do vary across the state. We also have a baseline looking at what the growth factors are now which we do assess throughout the 20-25 year process so we have measurements of success as to whether we are sharing in the expected community growth.

Our second goal is that we plan proactively. That means that we do plan in consort with the local communities, the planning organizations and local communities. But we also look at our lands and look at what we might be able to do to enhance them so that we can plan for the best use of these lands whether it be a lease situation or whatever, that we plan proactively for our property. Looking also at benchmarks so we can assess ourselves to see that we are doing this.

Finally the goal which is primary in all of our minds in trust lands is to increase the revenue. We have a number of steps we will go through in order to assess whether the steps we are taking, the activities we are undertaking, do actually in the end increase the revenue for trust lands. We look at a selection process for selecting lands for particular approaches using our land staff, using a real estate identification team and of course using public input as we look at these properties. So we have first a funnel system whereby we have input from our staff, from real estate specialists within our staff, and from the public and the Board in preliminary approvals. In the end we have a project. For these projects we may be using one of our land use authorizations, we may decide to lease land, we may decide to sell land, exchange it, or to put an easement on the property. These are the tools we have that we will be utilizing once we've gone through the process of selecting parcels for projects. We do also have the funnel filter process as well. This is the process we go through once we have selected the parcel, going through the MEPA process, going through the prioritization of different projects, and finally coming up with a land use decision on how we decide to use this land given public input, given the location of the land, given the community, given the process we've gone through, and given what in your estimation what is best for the trust. This is a well thought out process. After having been involved in it for the last three months and working with the folks in the Trust Land Management Division and the Real Estate Management Bureau I am asking the Board to concur with my selection of Alternative D which would allow the Real Estate Management Bureau to use this plan, Alternative D, to become the plan for the guiding framework for the real estate decisions on trust lands. I think this is a fairly progressive and creative process that we've developed.

Mr. Morrison asked for an explanation of how the PEIS incorporates and respects the process we established with respect to the issues in Whitefish?

Jeanne Holmgren, Real Estate Management Bureau Chief, said in fact that is one of the goals that Director Sexton talked about, how we are going to plan proactively. Not only the Whitefish Plan but we did a two-year planning process for a section in Kalispell, Section 36, where we already have a Lowes and a planned Costco, a school and perhaps a forest service building and residential development. That local government review and working and developing where, when, and how we will develop state trust lands is involved in our goal #2. If the growth policy is not favorable to where the growth is going in a particular area we will work with neighborhoods, we will go through those local regulatory processes that involve significant public involvement.

Mr. Morrison said okay but separate and apart from the local regulatory processes, what we did in Whitefish was establish a representative community planning board that spent a tremendous amount of time over the course of a year, they spent their own money, and they made recommendations they believed were consistent with our trust obligations but at the same time were sensitive to the needs and the goals and values of the local community. What I want to know is, is that process that was unanimously supported by the Board two years ago, that we talked about specifically as being a model, going forward as we continue to confront these issues with cities growing out into areas that have been productive historically through traditional uses? So if that is going to be a model and if we are going to continue to attempt to bring a representative sample of the community together to give us that kind of input, is that factored into this PEIS specifically, in some way separate and apart from dealing with regulatory parts?

Ms. Holmgren said the development of the Whitefish neighborhood plan was the result of a neighborhood planning process which is set forth in going about a local process to amend a growth policy. How a neighborhood planning process is established, will there be a committee similar to what is happening in Whitefish is going to be largely dependent upon the area and the neighborhood. Should we try to force that same type of process in Billings, Montana, if folks are interested in doing it in Billings? Yes. But if they are not interested in forming that same type of committee and collaboration, then we will work with those communities as is necessary and as they feel is appropriate.

Mr. Morrison said but we'll give them an opportunity to participate in the process in that way?

Ms. Holmgren said yes.

Mr. Morrison said in addition to that with respect to Whitefish specifically here, what does Alternative D mean in terms of the plans for the development of the 13,000 acres?

Ms. Holmgren said the Whitefish planning process is integral in implementing the programmatic plan, it is part of the programmatic plan. As the programmatic plan envisions working with communities, this is something that makes sense and we certainly intend to implement the Whitefish plan as we implement Alternative D.

Mr. Morrison said do you have an idea of what Alternative D translates into in terms of number of acres allocated to residential development, number of acres allocated to commercial development, number of acres allocated to conservation easements, alternative uses, traditional uses?

Ms. Holmgren said yes in fact it is in the Record of Decision. The concept is that we will grow as communities grow. We have made a prediction in the programmatic plan as to how many acres are going to be necessary to accommodate the future growth of Montana and what our proportionate share of that is. It is identified that that is something that we will look at trying to achieve. Now, are those goals, are those strict objectives associated with it, do we have to go out and develop 9,000 acres of residential land through 2025? If the growth is not occurring in the area where we have the land base to accommodate that, we can't make it happen. We can't force something. But that is what the plan has predicted, that our proportionate share of growth would occur. We will monitor, that is part of the measure of success of this programmatic plan, we will monitor to determine are we growing as we had predicted in this plan. There are caps that we cannot exceed the growth. We cannot exceed a certain number of acres through 2025. But we're looking at growing as we had predicted through Alternative B that has come into Alternative D.

Mr. Morrison said my question is is there a specific number of acres that you can say Alternative D is bound to lead toward development for residential-commercial use?

Ms. Holmgren said if you look at page 3 of the Record of Decision, residential acres total for all land offices is between 7,000 and 11,000 acres of development.

Mr. Morrison said out of 13,000?

Ms. Holmgren said no it would be out of our 5.2 million acres. The NW Land Office, for example, would be 5400 acres, the Eastern Land Office, where we do not anticipate growing significantly, would have 3-23 acres. For conservation, we've indicated we would be proactive in trying to achieve conservation in those areas that are adjacent to national parks, national monuments, wildlife refuges, and those specific areas. There is conservation contemplated when we are developing rural-residential neighborhoods in that we would try to cluster and maintain as much open space as financially possible in achieving fair market value associated with those lands.

Mr. Morrison said does the department believe that Alternative D is consistent with the recommendations of the Whitefish planning group?

Tom Schultz said yes we do. Of the two things I want to point to one is the chart on page 3 of the Record of Decision that shows the NW Land Office is 3200 – 5400 acres, we would anticipate that would be appropriate to develop under this plan for residential purposes. On page 13 it says projects selected under this plan will be required to recognize other activities that are ongoing or existing at the time of the decision document such as existing leases, licenses, subdivision plats, and neighborhood plans including Section 36, the Kalispell neighborhood plan, and the Whitefish neighborhood plan. So I think your initial question was does the Whitefish plan constrain this? And yes, it does. What we tried to demonstrate is there are over 300,000 acres of trust land within the NW Land Office, there are 13,000 acres in Whitefish. The Whitefish plan contemplates that somewhere between 3% - 5% of the 13,000 acres would be appropriate for development. Even under this scenario, 3% - 5% of 13,000 acres, which is less than 1,000 acres, for development that would contribute to the 3200 – 5400 acres. We would anticipate somewhere in the range of 1,000 acres of that would likely fall in Whitefish per the neighborhood plan that was developed in Whitefish.

Mr. Morrison said so the difference between 1,000 and 5400 is going to be made up elsewhere in the northwest?

Mr. Schultz said that's correct. Within those other 300,000 acres of trust land.

Mr. McGrath said my understanding is we are committed under Alternative D to follow local growth policies, local regulations, concede any ability to contest those and agree we will follow local subdivision regs, local growth policies as part of the plan.

Mr. Schultz said that's correct, and whatever that local process dictates. If we do something in Belgrade or Bozeman and there is significant community interest that they want a state focus group, that is contemplated under this. We would basically work the process for the amount of local interest that occurs on the ground.

Governor Schweitzer said is there some legislation that is pending in this session that we ought to consider as a companion part and parcel in terms of conservation easements and things we have considered in this Record of Decision?

Mr. Schultz said we have drafted this plan so we are not limited to any one particular piece of legislation. We do have authority to issue conservation easements to Fish, Wildlife & Parks in limited circumstances. However, for the Whitefish plan in particular to be fully implemented and components of this plan we anticipate needing additional authorities to either sell development rights or sell conservation easements. Many of the members of this Board spoke regarding both of those bills. There is SB 97 which is a departmental bill in which we use the term "selling development rights" and there is another bill by Senator Weinberg that talks about selling conservation easements. Both of those bills, from my perspective, try to achieve the same thing: allow us to strip off the subdivision rights, perpetuate historic uses of the ground, get top dollar for the trust, and keep land in production and keep open space on the ground. So both of those bills, either one of them or both of them together, we think would support the implementation of this plan and the Whitefish plan.

Motion was made by Ms. McCulloch to approve the programmatic plan for the Real Estate Management Bureau. Seconded by Mr. Morrison.

Diane Conradi, Lincoln Institute of Land Policy and Sonoran Institute working on state trust lands in the west, said the question that is arising already among you is "how." How is this plan going to be implemented? While it is a programmatic plan, the way it is implemented on the ground is going to make or break whether the state is actually operating in the real estate business in a way that is good for the beneficiaries, good for the communities. We will be happy to work with the state. A discussion will be necessary either through rulemaking or at least to initiate the discussion about rulemaking, to talk about how, how this plan is going to be implemented. When you hear figures like in Whitefish where there is up to 5400 acres for development, but that is the entire NW Land Office area, where is that going to happen? And truthfully 100 acres in the right or wrong place can really make a difference to a community. The "how" is really critically important at this point. How the projects come forward, how the real estate bureau is acting within the other uses that are occurring on school trust land, how this state will work with local communities. It is true there is no cookie-cutter approach, collaborative efforts really depend largely on the communities that they are located within, the energy behind it, and whether counties and cities want to do that. But I think the state is actually in a position to provide leadership. Rather than have communities approach the state about engaging in this kind of process, they might provide some leadership in helping communities engage in this kind of process. We are currently in the process of gauging whether this collaborative process that occurred in Whitefish is satisfactory, both to the participants and the community. I can say that when the City of Whitefish and the county had a preliminary planning board session on this plan, there were 50-60 people there and eight spoke to the plan. Which is means that it is not that controversial. They had some legitimate concerns, some were about projects that might occur within the next few years around their property. But it was largely non-controversial. While that process took a little bit longer, I would say from that divisiveness that was avoided and the support all around for that kind of plan pays off. There is some kind of leadership the state can provide in facilitating those kinds of processes.

Mr. Morrison said it sound like what you're saying is we need to be attentive in the implementation but there is nothing about Alternative D that is inconsistent with the plan that was developed.

Ms. Conradi said in Whitefish. Correct. That is my opinion.

Governor Schweitzer said the plan would allow up to 5% of 300,000 acres in the NW Land Office. Then I heard that the Whitefish plan would allow up to 1,000 acres in the Whitefish area. But isn't it likely of the 5% of the 300,000 if that somebody wants to develop the land they will develop it pretty close to a place where people are living? Close to where development is occurring, where the most rapid growth is occurring? And wouldn't one anticipate that over the next twenty years the most likely places that developers are going to consider developing are going to be in and around the Flathead Valley as opposed to the rest of northwest Montana? So if the goal is to develop 5,000 of the 300,000 acres, isn't it likely that the places where we will get the most activity is going to be in the Flathead Valley?

Ms. Conradi said in the NW Land Office, I'd say that that is a good guess. It goes back to the comments we made originally on the PEIS that the state would be well served rather than using the land office which is an arbitrary administrative boundary, if they took a hard look at the markets, made a decision about what markets they wanted to act within, and then put the resources in that market. We had initially suggested limiting using the funnel filter process to identify the target markets and then work on those markets to enhance the entitlements, make sure the growth that occurs is good for the community, take the extra time you need to do that but at the same time you'll reap the benefits from working on it. This plan puts all of the lands in the hopper for consideration and uses a very rough measure of population growth and projected land ownership rather than looking at target markets.

Governor Schweitzer said I'm just trying to get to where it may be an inconsistency. This neighborhood group in Whitefish had proposed up to 1,000 acres of the 13,000 acres in their community. But on the other hand we're saying in the NW Land Office, up to 5% of 30,000 acres, which is 15,000 acres. Obviously, the State of Montana is not going to decide what is going to get developed. We only get to say yea or nay as they come in the door. Most attempts are going to be to develop in those places where real estate values are the highest and people are moving in at the greatest rate. So it appears to me there may be some inconsistency if what we're saying is we are going to respect the local process and that's up to a maximum of 1,000 acres, and yet we are going to allow up to 15,000 acres of development. Most of those 15,000 acres are going to ask to develop in and around that area where we said only 1,000 acres. It appears to be an inconsistency and we're setting in motion something that can last 20 years, well after many of us will no longer be sitting at this table. I want to make sure we're not setting something in motion that ends with a result that wasn't proposed today.

Mr. Schultz said we're not talking 15,000 acres. What I meant to say is 3% - 5% of Whitefish is what had been discussed in the Whitefish plan. We're talking 3,000 – 5,000 acres across the NW Land Office. If it was 3,000 acres it would be a 1/3 of that which would basically abide by the Whitefish plan which is identifying 1,000 acres. Those numbers are on page 3 of the Record of Decision and they show 3,000 to 5,000 acres at the NW Land Office. Your premise is correct. We're going to get pressure to grow in the valleys where people currently live. But that's what we're also saying, we will involve the community to make sure DNRC isn't doing things that don't make sense against the community wishes. If we are projecting 3,000 – 5,000 acres, and the Whitefish plan is contributing 20% - 30% of that then we know either one of two things. One, that there is going to be other growth in Kalispell and elsewhere up in the Flathead, or Sanders County or Lake County, we're not just talking Flathead County, there are five counties within the NW Land Office that could contribute to that. Secondly, maybe our numbers in the EIS are off. If we're saying up to 1,000 acres could be developed in Whitefish and that's all that we do, well, that's all that we do. Our numbers are for analysis sake to make best and worst case scenarios so we could do an environmental affects analysis and look at those things. As Ms. Holmgren indicated, those numbers are not targets where we'll go out there and so stuff, those numbers try to give us an idea given the markets what could occur on this state land. Getting back to the comment about doing a market analysis, we're very concerned about doing a market analysis as part of this process but there has been a

lot of discussion lately of a real estate bust. There are numerous articles that talk about problems in the real estate market throughout the country. For us to do a market analysis at a broad scale right now and try to focus our efforts knowing it is going to take a long time, even over the course of a year to do one or two projects, the life of that analysis would be very limited. Much as an appraisal is good for six to twelve months, a market analysis of real estate in Montana would have a limited lifespan. We do intend to dedicate our resources to the ones that make sense that there isn't a lot of controversy over. That's where we're going to dedicate our resources and our effort in working with the public in the short term. But this was more to give us a broad brush approach to what could occur over twenty years, allow us to do an analysis, and help us to have some baseline to gauge our progress. Are we involving the public? We have monitoring that Ms. Sexton suggested we look at, let's do a survey, those kinds of things. We are trying to incorporate those things through the process.

Anne Hedges, MEIC, said as I listen to the discussion here, this whole thing is going to come down to predictability. Realtors and developers are going to want predictability about what they are going to do. What is going to happen with their property, or other property, and where growth is going to occur, and where infrastructure is going to occur. This is a good start. I am here to support this today, it is incredibly ambitious. I look at the idea of 11,000 acres across the state in twenty years being developed and I say that is a big number. Considering some of these smaller developments we've had debates over, and I am not talking Whitefish because it is an anomaly in that it is a huge parcel of land, but I think what we're going to see is much smaller sections of land. That is where the debates are going to be. Communities are going to be concerned about how it is going to occur. When people call me they say this is going to happen in my neighborhood what should I do? I am going to turn them over to DNRC because I am not sure. That is the problem with a plan. I think you'll see that, its really clear on page 2 of the Record of Decision. It says this provides goals and objectives and evaluation tools for real estate management for trust lands. This isn't the specifics. What we need and what people are going to want when they call us in five or ten years and say how is development going to occur in my community, they are going to want rules, they will want specifics. That is the only predictability they are going to have. This doesn't tell you what drives the process, it tells you that you are going to have people out in these land offices working for DNRC making decisions about what parcels are going to be put on the block for development but it doesn't say who drives that process. Who is allowed to drive that process? How will the response from the agency be based upon what they say? There will be a lot of developers who will love this concept that the state is going to be moving forward and developing 11,000 acres in the next twenty years. How much weight will they be given? They are going to be driving this process for profit in the short term. The Board is not here for that reason, it is here for the long term benefit of the trust. The only way to try to maintain that decision making that is occurring today is rulemaking. There is no sunset date on this, there is no limit on how much land. There are goals and objectives, but there is no predictability in this system for people in communities when they see a parcel of land that is going to be targeted by DNRC. The Board can't avoid these conflicts coming down the road, unless we have rules that detail out how we get there. I think the rulemaking process could be pretty simple with a number of meetings with all the interested parties to sit down at the table and ask questions back and forth, not just public hearings. We can put the answers to those questions into the language of the rule the agency will follow down the line. That is the only way to implement this and provide the predictability everyone will want once you start messing around with the land in their communities.

Tim Davis, Montana Smart Growth Coalition, said I agree with Ms. Conradi and Ms. Hedges. We think from where this started, from where the PEIS came from, it has come a tremendous way. I give kudos to Director Sexton and the staff. They have done a tremendous job of addressing the concerns that were raised in the preferred alternative, and we support the preferred alternative. But how are you going to implement it? If you look at page 17, it talks about eleven selection criteria for projects but it doesn't talk

about how those are going to weighted. I may be wrong, but I don't believe the EIS talks about how those are going to be weighted or how they are going to be used, that is just one example of why there needs to be more clarification. One example in rules, the Treasure State Endowment Program from the Department of Commerce has nine criteria for projects that are selected for the endowment. Each of those projects are weighted differently depending upon where they are in the criteria list. If you are at the top of those nine you get the most points, if you're at the bottom you get fewer points. This is just one example of why we think there needs to be a clearer process on how they are going to implement the goals and objectives of the EIS and the Record of Decision.

Ms. Sexton said I know that I have had quite a bit of input from folks regarding rulemaking and frankly, I've not gone through that process myself. What I would like to propose is before the vote if the Board approves this request, I'd like to suggest that we have round table discussions with the interested parties. With those who spoke today, along with staff members and folks in real estate, perhaps other interested people and those involved in the planning process, and maybe even a short one day round table discussion to see where we are with this. This is sort of an unusual proposal. It is not an exact comparison to other things such as the land banking. We do already have rules for a number of the eventual tools we'll use, whether it be a lease, a sale, etc. So I think this is a little bit different. Before we say yes we're going to do rulemaking or no we're not, have a round table discussion with interested parties.

Governor Schweitzer said we've got a couple of pieces of legislation which could be pretty important for what we're trying to accomplish. We're in the middle of the legislative session, they may or may not pass. We've been working on this for some time, I'd like to see this not pass today and have it come back and let us look at it again given the couple pieces of legislation that are pretty important concerning conservation easements on these lands and others.

Mr. McGrath made a substitute motion that the Board postpone consideration on the Real Estate Management Bureau's PEIS, and that it come back to the Board in April, May, or June. He said my reasoning is like the Governor's, there are bills pending that will have an impact on how I personally view the EIS and how we're going to proceed in the future. The second thing is the issue about rulemaking. I do think we need to make some decisions of whether we are going to have rulemaking or not. I am a big believer in planning and growth policies, I commend the department and staff for what they've done. I think that ultimately I am going to want to support a plan and probably this plan, but I want to see what happens with that legislation. I don't see that we're in a big hurry, my preference would also be that we wait.

Ms. McCulloch said I don't' have a problem with waiting, I usually have a problem with rushing too much. I don't feel that our waiting to act on this plan should preclude Director Sexton's group in meeting to discuss the rulemaking process. I don't have quite the same onerous thoughts about rulemaking because of legislation and state policies. My agency conducts rulemaking on an ongoing basis anyway, and as a legislator I have a background with why we need rulemaking. I also have a legislative fear of rulemaking sometimes, but I think it is a necessary part of things. I don't think you need to preclude meeting.

Mr. Morrison asked Mr. McGrath to sharpen his motion as to when he wants to postpone this item?

Mr. McGrath said I would move we postpone this until the May 16th meeting of the Board so we can determine what the legislature does with those pending bills that could have an impact on this.

Seconded by Mr. Morrison. Motion carried unanimously.

Ms. Sexton said would you like me to convene a group of folks before that time?
Governor Schweitzer said please do.

Mr. Johnson said do you anticipate members of the board having an opportunity of being involved in that part of the process?

Ms. Sexton said if you'd like to – definitely, or members of your staff however you'd like that to be. I will discuss that with my staff and try to get a memorandum out to you as to how we might organize this to make it not too awkward.

305-8 RIGHTS-OF-WAY APPLICATIONS

Ms. Sexton said these are all fairly standard. The Geraldine water tower application #13404 is interesting,. There is one that I would like to remove, it is for the Power River Energy Corporation which was directly related to Agenda Item #305-3, the Coalbed Methane application which was withdrawn. This particular application will have to be postponed until the Board acts on the issue.

Ms. Holmgren said there is an easement for the placement of the Geraldine water tower on state trust lands. The placement and the location of this tower is agreed to by the city and all parties. In looking at, identifying, and securing those rights to locate the tower it was discovered that the state's ownership was not necessarily the ownership. The surveying, the corners associated with the location of trust lands in this particular parcel have been identified as trust lands and not privately-owned land. So it seemed to be important to the City of Geraldine that they wanted to begin construction in May 2005. If it is found that the survey pins are not where they have been discovered to date and they are somewhere else and it is not state trust land, there will be a disclaimer in the deed that the state disclaims all interest in the property. We were asked to move this forward because the City of Geraldine wants to place the water tower in this particular location.

Also this month, the applications are #12513 from NorthWestern Energy for an overhead electric transmission line; #13400 from Yellowstone Valley Electric Cooperative for an overhead electric transmission line; #13401 from Triangle Telephone Cooperative for an underground telephone communications cable; #13403 from Nemont Telephone Cooperative Inc. for a buried telecommunications line; and #13404 from the City of Geraldine for a municipal water well, water storage tank, buried water transmission main line and associated appurtenances.

Motion was made by Mr. Morrison to approve the applications for rights-of-way. Seconded by Ms. McCulloch. Motion carried unanimously.

PUBLIC COMMENT PERIOD

Mr. Rockey Whipkey, Montana Horse Racing Association, said I sent a letter to the Board on March 9, 2005, regarding the fairgrounds. As we can see from the headlines in the newspaper today, their plan is no horse racing. In my letter I state, "It has come to the attention of the people of the State of Montana that the Grantor described lands in the grant deed to state lands transferring state land to the Lewis and Clark County as described in the deed recorded by the Lewis and Clark County Recorder's office, dated October 24, 1997, Book M-19, page 8579, Record No. 569722, has ceased to be used as described in the

conditions of said deed below." In the letter I wrote exactly word for word what is in the deed, and I do have a copy of that deed if the Board would like to see it. In the deed the wording is, "The public use of the fairground lands by the Lewis and Clark County is restricted to those uses associated with the maintenance of the fairgrounds for traditional public uses such as, but not limited to, exhibitions, rodeos, competitions, shows, trade shows, auctions, carnivals, circuses, theatrical performances, public entertainment, animal barns, picnic and camping grounds, livestock expositions, agricultural education, and public organizational meetings. Concessionaires including the existing café which services the above-described public purposes are permitted, however, whenever the above-described land shall cease to be used for the above-described public purposes, or ceases to be owned by the Lewis and Clark County titlement of the above-described land shall revert to the State of Montana upon written notice to the Grantee." It continues on to describe what the obligations are for the Board. Under those conditions as described above the Lewis and Clark County has ceased to maintain certain aspects of said property that has inhibited the public use. The cessation of maintenance now has dictated that the historic and traditional Helena Downs Race Track will no longer be usable to hold traditional competitive events on said property. Due to the total disregard for the historic and traditional property uses, the Lewis and Clark County has made decisions that have deterred historically documented competitions in the lands described in the said deed above and plans are in place to completely remove a historic and traditional documented competition area of the lands. This will prohibit the public use by removing the historically documented public event valued area from the grounds listed in the said deed above. This area is historically known as Main Avenue. This was documented by the Helena City-Lewis and Clark County Historic Preservation Commission and Paul Putz, Helena City-Lewis and Clark County historic preservation officer. This was done in the Lewis and Clark County fairgrounds historical site review of December 2003. This area is documented as the second oldest horse racing track in the United States. It was constructed for opening race day September 25, 1870. This was also the day the very first fair was held on that fairgrounds. The horse racing competition has been held at this location in Helena, Montana, traditionally for over 130 years. This competition ceased in 2000 due to actions taken by the Lewis and Clark County. These actions consisted of removing traditional elements required for this competitive event such as bleachers, track surface soil, bedding facilities, degradation or removal of buildings required for event competition namely barns, stables, paddock, judges tower, track fencing, wagering facility and wiring, plumbing, and other unnamed track and traditional event-required accouterments. Thus in turn, racing has ceased and certain racing business ventures forced to quit in financial detriment. Documentation of these businesses losses are available through banking files as well as the racing organization files.

We brought this to the attention of the Lewis and Clark County numerous times at public meetings with continued support from the public. We found that their planning is in place that will deter from the traditional use of the fairgrounds and prohibit any future public entertainment use of said facility by encroaching upon the race course footprint placing an exhibition building and parking area within the course center boundaries and creating roadways on the course that will prohibit racing events from occurring ever again. This footprint plan and building has been debated and an alternative location upon the property was offered but there is no contingency plan. The people of Lewis and Clark County voted a tax levy into law in 2004 and this would finance the maintenance of the property listed in said deed and for the construction of an exhibition/grandstand building that would have replaced the old grandstands and buildings by constructing a new exhibition hall/grandstand in the previous location. As a voter and supporter of the levy I want what the many decisive voting county citizens voted to provide the county, those funds to do just that. Not to revise the initiative text and to take away from the traditional activities use of said property. Under the provisions of the deed described by the Lewis and Clark County it is in violation of certain referenced-deed conditions and as such should fall under the conditions reverting stewardship of said property back to the State of Montana. There was a plan submitted to the Lewis and

Clark County as a business proposal but they insisted on having the financial steps included with that. We consider that to be a violation of the business. He provided a business proposal with a budgeted race financial statement in it. I would like the Board's attention on this. I had a deadline of April 30 but it has been moved.

Mr. Morrison asked what provision of the deed do you feel is being violated?

Mr. Whipkey replied the removal of competition. If it hadn't been for the race course, that fairgrounds wouldn't be there today. It provided the revenue flow that maintained that for us.

Ms. McCulloch said the language on that says "such as, but not limited to."

Mr. Morrison said clearly they continue to use it for exhibitions, rodeos, carnivals, competitions, and that sort of thing, but your position is if they change any historical use that is itemized here it is a violation of the lease?

Mr. Whipkey said wouldn't you think so? If they were removing the most traditional aspect of the fairgrounds? Horse racing has been a part of Helena since 1865 and that fairgrounds was born under the basis of a race track, it financed the buildings that were placed out there. The state had stewardship of it at that time. It was agricultural related, educational. While their idea is to put a steel building-concrete slab parking lot in the middle of a traditional historical aspect competitive value property, and ruin the past and the future for horse racing in Helena. This is no longer a county issue, it has become a statewide issue, that's why I am here today. This is the only way I can see to step up and do anything about it.

Mr. Morrison said the former Lewis and Clark County Attorney (McGrath) is recusing himself.

Mr. McGrath said I negotiated this deal.

Governor Schweitzer said I respect that. Thank you for bringing this to our attention. We will have some legal counsel look at this.

Mr. Whipkey said I would hope that we could respond to this before your next meeting. Is there any possibility that that would be available to us?

Governor Schweitzer said I think not because in order for the Board to respond or take a position we have to have a meeting and you've just brought this to us as an informational and not as an agenda item for action. So I don't believe we'd be able to prepare an action before our next meeting.

Joe Trow, Lewistown, said I came because I need the boundaries of your State of Montana in which you have what you've been speaking of all day, acres. There must be a number of acres around the outside of here, and to get one acre the simple mathematical way is to take a strip 99 miles long and 1 inch wide, that is an acre. You take an acre and you can make it round but its still an acre. If you subtract one foot or add one foot from the mathematics, you don't have an acre, you have minus an acre or plus an acre. We need a boundary around Montana before we can say there are acres in Montana. I've asked this question since 1986, I've been to Land Board meetings by the hundred, I've been to the Secretary of State's office and they say we have no boundaries, I've been to the Auditor's office and they say we have no boundaries, I've been to the Office of Public Instruction and they say we have no boundaries, I've been to the previous Governor's office and they said the same. Today I meet with Hal Harper and he will have to say there are no boundaries for Montana. If we have no boundaries for Montana, then we have a

terrible thing with the state Supreme Court which I have a writ going to the state Supreme Court and I have to mention one of your people's saying you have no way of knowing your Board's area of jurisdiction. I don't know how to put it any planer than we need a boundary for Montana. The Library of Congress doesn't have a boundary for Montana, none of our federal representatives have a boundary for Montana. The federal Supreme Court, all they need is a request from one of you people to put a moratorium on what we have here in Montana and then they will have the Secretary of Interior make a boundary for Montana, and then our state doesn't have to do anything. They will do it by GPS. This can be done but we have no boundary for Montana today. There are only two other states that don't have a boundary, North Dakota and South Dakota. Why? Because President Benjamin Harrison said we made it as a state but with no boundaries. Congress from the law that they used in 1889, never had any boundaries. Now when we say it is on a map, I have to ask each person here if you own property is your property only on a map or do you have one stake and you go around and come back and then you own that piece of property in the United States. You don't own it in Montana as far as I understand until we have a boundary. If this Land Board doesn't have a boundary what jurisdiction do you have that I can go to? I've been dealing with Mr. McGrath's office and I can't find a district court that has a boundary that I am standing in. I'm only 77 and when I can't have a court that I can take you to and charge you with a crime there is something wrong with me. And if you can't charge me with a crime, why have a rule that you make on our public lands? When I say our public lands, I believe that. I need some documentation either we have a boundary for Montana or we don't so I can enter it with the Supreme Court. I can't have any standing in any of those courts and that's why I am here today. I want to know where I can find the boundary. I have all this documented and I've brought this documentation to these people many times. I am asking this Board to give me an answer whether they have a boundary for Montana which limits their jurisdiction of amount of trust lands. Trust lands came to Montana by a percent not by where they were located. I am asking how much trust lands didn't we receive.

Motion was Mr. Johnson to adjourn. Seconded by Mr. Morrison and Ms. McCulloch simultaneously.